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No. 93-880

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JUDY MADSEN, et al.,

Petitioners,

- v. -

WOMEN'S HEALTH CENTER, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONSE TO MOTION TO STRIKE

Operation Rescue, Patrick Mahoney, Randall Terry, and Bruce Cadle (hereafter "OR et al."),[1] Petitioners in No. 93-833 and Respondents in No. 93-880 (see Rule 12.4), hereby oppose the motion of Petitioners Judy Madsen et al. (hereafter, "Madsen et al.") (No. 93-880) to strike the petition for certiorari of OR et al. (No. 93-833). The motion is procedurally improper and substantively meritless. This Court should therefore deny the motion.

I. Background

Women's Health Center, Inc., et al. (hereafter "WHC et al."), plaintiffs in the state circuit court and Respondents in this Court in both Nos. 93-833 and 93-880, obtained an

[1]None of these parties is a corporation. See Rule 29.1.

amended permanent injunction in the Florida circuit court against both Madsen et al. and OR et al. That amended permanent injunction, which the Supreme Court of Florida later affirmed, is the subject of both petitions for certiorari in this Court (Nos. 93-833 and 93-880).

Madsen et al. and OR et al. elected to pursue separate appeals, to the Fifth District Court of Appeal of Florida, from the amended permanent injunction. Under the Florida Rules of Appellate Procedure, each set of appellants remained party to the other appellants' appeal. The Florida rules designate as an "appellee" in a case "Every party in the proceeding in the lower tribunal other than an appellant," Rule 9.020(f), Fla. R. App. P. (emphasis added). Thus, the appeal of defendants Madsen et al. brought with it both the plaintiffs WHC et al. and fellow defendants OR et al. Likewise, the subsequent, separate appeal of defendants OR et al. brought with it both the plaintiffs WHC et al. and fellow defendants Madsen et al.[2]

After appealing, Madsen et al. successfully petitioned for certification of the case to the Supreme Court of Florida, which accepted jurisdiction. This step simply transferred the appeal proceedings, in their entirety, from the Fifth District Court of Appeal to the Supreme Court of Florida. See Rule 9.125(g), Fla. R. App. P. Thus, both WHC et al. and OR et al. remained parties to the proceedings in the state supreme court.[3] Both Madsen et al. and OR et al. urged the state supreme court to reverse the injunction.

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[2]This practice of automatically bringing all parties to a lower court proceeding before the reviewing court is precisely the practice this Court follows. See Rule 12.4 ("All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court . . . " and "All parties other than petitioners shall be respondents . . .").

[3]It is therefore not at all surprising that the Supreme Court of Florida permitted OR et al. to file a brief as "Certain Respondents/Appellants" instead of requiring OR et al. to appear as amici. See Appendix A.

The Supreme Court of Florida affirmed. In its opinion affirming the injunction, the state supreme court drew no distinction between OR et al. and Madsen et al. Instead, the court simply referred to "Operation Rescue and others (Operation Rescue)," App. A-2, and referred to all of the defendants-appellants generically as "Operation Rescue," see App. A-10, 12, 14-17, 19-24. Indeed, the state supreme court described the appeal before it as having been taken by Operation Rescue, App. A-10, and described the matter before it as "the trial court's order," id., not the appeal of only certain parties. Clearly, the Supreme Court of Florida was -- properly -- adjudicating the case as to the plaintiffs-appellees (WHC et al.) and both groups of defendants-appellants, i.e., Madsen et al. and OR et al.

OR et al. (No. 93-833) and Madsen et al. (No. 93-880) filed separate, timely petitions for certiorari in this Court.

II. Argument

Madsen et al. have moved to strike the petition for certiorari of OR et al. This Court should deny the motion.

A. Procedural defectiveness

The Motion to Strike the Petition is procedurally defective and therefore improper.

This Court's Rule 15.4 provides: "No motion by a respondent to dismiss a petition for certiorari will be received." Madsen et al., as respondents in No. 93-833,[4] see Rule 12.4, cannot circumvent this clear rule simply by using the word "strike" instead of "dismiss." Hence, this Court should reject the Motion to Strike outright. See generally R. Stern, E.

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[4]Madsen et al. use the wrong caption and docket number -- No. 93-880, the number for their own separate petition -- on their Motion to Strike. Obviously this is an error, as Madsen et al. are actually seeking, as Rule 12.4 respondents, to strike the petition in No. 93-833.

Gressman, S. Shapiro, K. Geller, Supreme Court Practice 643-44 (7th ed. 1993).[5]

B. Substantive meritlessness

The Motion to Strike also fails for lack of merit.

The premise underlying the Motion to Strike of Madsen et al. (movants) is that OR et al. were not parties to this case in the court below (the Supreme Court of Florida). Yet movants themselves acknowledged, in their Petition for Writ of Certiorari, that OR et al. were parties in the state supreme court. See Pet. at ii (listing parties and including "Operation Rescue, Patrick Mahoney, Randall Terry, Bruce Cadle"), 7 n.5 (referring to OR et al. as "other parties in the Florida [supreme] court").

Movants nevertheless claim that because OR et al. filed a subsequent and separate appeal in the Florida Fifth District Court of Appeal, they could not have been parties either to the movants' original appeal or to the proceedings in the Supreme Court of Florida. But as explained supra § I, movants' premise is false. OR et al., like WHC et al. and Madsen et al., were parties to both appeals in the state district court of appeal as well as to the proceedings in the state supreme court. As parties adversely affected by the decision of the Supreme Court of Florida, OR et al. has every right to seek review of that decision in this Court.

[5]The Motion to Strike is also formally defective, not only because it has the wrong caption and docket number, see supra note 4, but because it is not printed, see Rule 21.2(b) ("any motion the granting of which would be dispositive of the entire case or would affect the final judgment to be entered . . . shall be printed in accordance with Rule 33 . . .").

III. Conclusion

For the foregoing reasons, this Court should deny the Motion to Strike.

Respectfully submitted,

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January 7, 1994

Supreme Court of Florida

THURSDAY, OCTOBER 28, 1993

OPERATION RESCUE, ET AL.

Petitioners,

vs. Case No. 81,908

WOMEN'S HEALTH CENTER, INC., ET AL.

Respondents.

* * * * * * * * * * * * *

Motion Of Certain Respondents/Appellants For Leave To File Supplemental Brief has been considered and is granted. The supplemental brief has been placed with the file.

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TEST:

Clerk Supreme Court.

bdm

c: Mr. John Tanner
Mr. Jay Alan Sekulow
Mr. Walter M. Weber
Mr. John Stepanovich
Mr. Talbot D'Alemberte
Mr. Christopher J. Weiss
Ms. Terri Blair
Ms. Kathy Patrick
Mr. Mathew D. Staver

APPENDIX A

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